

ISSUES

Respondent contends claimant's repetitive trauma did not arise out of and in the course of employment and that claimant's repetitive trauma was not the prevailing factor causing her current complaints, presenting condition, or need for medical treatment and restrictions.

Claimant argues the ALJ's Order should be affirmed.

The issues presented to the Board for consideration are:

1) Whether claimant sustained injury by repetitive trauma arising out of and in the course of her employment.

2) Whether claimant's repetitive trauma was the prevailing factor causing her medical condition and resulting disability or impairment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record, this Board Member makes the following findings of fact and conclusions of law:

Heather Shaw was age 21 when she testified at the September 19, 2012 preliminary hearing. Respondent hired claimant as a housekeeper on September 3, 2011. Her job included vacuuming, cleaning restrooms and patient rooms. Claimant testified she did not have any right upper extremity (hand, arm or shoulder) injuries before working for respondent.

Claimant developed pain in her right hand when she was vacuuming in late December 2011. She described the accident:

Yeah. It started -- it started pushing -- I was pushing and I was doing all right. I got halfway done with the hallways and then it just started tingling. And then pinpoint needles and then it just went numb and I stopped and then I went to Val.²

Claimant began to experience numbness and tingling in her right wrist and in three fingers on her right hand. Respondent referred claimant to Dr. Richard Uhlig at the Herington Municipal Hospital, where claimant was seen initially on January 4, 2012. Claimant reported symptoms of numbness, tingling and pain in her right hand and arm. The treatment records from this provider contain a history of injury consistent with

² P.H. Trans. at 13. Val's full name and her specific position with respondent are not in the record.

claimant's preliminary hearing testimony. Limited physical activities, a wrist brace and physical therapy were prescribed.

On February 7, 2012, claimant was seen in consultation by Dr. Nanda Kumar, a specialist in neurology. Claimant's history and physical complaints were consistent with claimant's preliminary hearing testimony and Dr. Uhlig's records. Dr. Kumar recommended nerve conduction testing and additional physical therapy. Claimant underwent an EMG/NCS on February 7, 2012, which Dr. Kumar interpreted to reveal median neuropathy at the right wrist. Although Dr. Kumar diagnosed right carpal tunnel syndrome, he felt claimant's complaints were more due to musculotendinous pain over her right hand due to repetitive hand usage.

Claimant was examined at respondent's request by Dr. Anne Rosenthal on April 18, 2012. Claimant's history of injury is consistent with claimant's testimony and the medical records of Dr. Uhlig and Dr. Kumar. X-rays revealed no evidence of acute trauma, normal bone and joint alignment, no evidence of ligamentous disruption, and no evidence of soft tissue swelling. Dr. Rosenthal performed a physical examination. She diagnosed right carpal tunnel syndrome, although Dr. Rosenthal did not relate that diagnosis to claimant's accident using the vacuum cleaner. Dr. Rosenthal noted claimant displayed significant evidence of symptom magnification.

Dr. David Hufford was appointed by the ALJ to perform a neutral medical evaluation. The history claimant provided to Dr. Hufford was the same as documented in all the other medical exhibits as well as with claimant's testimony. Dr. Hufford examined claimant on August 16, 2012, and diagnosed median nerve entrapment at the right wrist consistent with carpal tunnel syndrome.

Dr. Hufford opined:

The prevailing factor in the onset of her symptomatology appears to be the repetitive use of the vacuum cleaner which includes a significant vibratory component. . . . Her employment commenced 3 months prior to the onset of her symptoms providing sufficient time for the repetitive vibratory exposure to have contributed to her condition.³

Claimant denied ever injuring or receiving treatment for her right upper extremity before the accidental injury in this claim. Respondent presented the testimony of two lay witnesses at the preliminary hearing, Jamie Potocnik and Betty Higgins, both employees of respondent. Both of these witnesses testified they saw claimant wear a brace on her right wrist shortly after the commencement of claimant's employment with respondent. Ms. Potocnik and Ms. Higgins also testified they heard claimant say her hand bothered her

³ *Id.*, Cl. Ex. 1 at 2-3.

when she worked cutting hair.⁴ Neither witness was more specific regarding when, and on how many occasions, these events occurred.

No medical records were offered that documented any previous injuries or treatment involving claimant's right hand, arm, or shoulder. No other documentation, from the workers compensation division or otherwise, was offered reflecting any prior workers compensation claims involving the right upper extremity.

K.S.A. 2011 Supp. 44-501b provides, in part:

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 44-508(h) provides:

"Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2011 Supp. 44-508(e) states:

"Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

In the case of injury by repetitive trauma, the date of injury shall be the earliest of:

(1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;

⁴ Claimant testified she worked as a barber or cosmetologist in 2009.

(2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;

(3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or

(4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.

In no case shall the date of accident be later than the last date worked.

K.S.A. 2011 Supp. 44-508(g) provides:

“Prevailing” as it relates to the term “factor” means the primary factor, in relation to any other factor. In determining what constitutes the “prevailing factor” in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁵ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁶

The undersigned Board member is persuaded claimant has proven by a preponderance of the credible evidence she sustained personal injury by repetitive trauma that arose out of and in the course of her employment with respondent.

Claimant’s testimony regarding how her repetitive trauma occurred and what physical complaints she thereafter experienced stands uncontradicted in the record. Uncontradicted evidence unless shown to be improbable, unreasonable or untrustworthy, may not be disregarded.⁷

Moreover, the histories claimant provided to Herington Municipal Hospital, Drs. Kumar, Rosenthal and Hufford are all consistent with claimant’s testimony regarding how she sustained injury. All of the medical evidence points to claimant having right carpal tunnel syndrome which was objectively verified by EMG/NCS testing. Claimant’s positive nerve conduction testing was not the result of symptom magnification.

⁵ K.S.A. 44-534a.

⁶ K.S.A. 2010 Supp. 44-555c(k).

⁷ *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

Dr. Rosenthal's conclusions are inconsistent with the other medical evidence regarding the cause of claimant's median nerve entrapment. Dr. Rosenthal did not adequately explain why claimant's symptoms commenced when she was gripping a vibrating vacuum cleaner in the performance of a housekeeping position that required continuous carrying, lifting and reaching.⁸ Dr. Rosenthal's opinions are outweighed by Dr. Hufford's conclusions and the other medical evidence.

The evidence does not support the notion that claimant's repetitive use injuries were caused by a prior job as a barber or hairdresser. The lay testimony of Ms. Potocnik and Ms. Higgins is unpersuasive given the lack of any medical or other documentation corroborating their testimony. If claimant previously sustained a work injury, received a right arm brace, or underwent any other treatment, that information would easily be obtained and offered into evidence. The lack of any such documentation reduces the weight to be accorded these witnesses' testimony. Moreover, the testimony of Ms. Potocnik and Ms. Higgins was vague and nonspecific regarding when, and on how many occasions, they saw claimant wearing a right wrist brace and when they claim claimant stated cutting hair and hurt her right wrist. Both witnesses could only state what they saw and heard occurred shortly after claimant started work for respondent. When Ms. Higgins was asked when she saw claimant wearing a right wrist brace her response was "'08 or whatever."⁹ Claimant's employment with respondent did not begin until September 2011.

Claimant's uncontradicted testimony as corroborated by the medical evidence, including the report of the neutral physician, has not been overcome by the testimony of Ms. Higgins and Ms. Potocnik. The undersigned Board member agrees with the ALJ that the opinions of Dr. Hufford are most persuasive on the issue of prevailing factor.

CONCLUSION

1) Claimant sustained personal injury by repetitive trauma arising out of and in the course of her employment with respondent.

2) Claimant's series of repetitive trauma was the prevailing factor in causing claimant's injury, medical condition and resulting disability or impairment.

WHEREFORE, the undersigned Board Member finds that the September 21, 2012 preliminary hearing Order of ALJ Rebecca A. Sanders is hereby affirmed in all respects.

IT IS SO ORDERED.

⁸ P.H. Trans., Resp's Ex. A at 6.

⁹ P.H. Trans. at 34.

Dated this 31st day of January, 2013.

HONORABLE GARY R. TERRILL
BOARD MEMBER

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